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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 29 June 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: Commission delegated decision of 29.6.2012 on investigations and fines
related to the manipulation of statistics as referred to in Regulation (EU) No
1173/2011 of the European Parliament and of the Council on the effective
enforcement of budgetary surveillance in the euro area

Delegations will find attached Commission document C(2012) 4361 final.

Encl.: C(2012) 4361 final



EUROPEAN COMMISSION

Brussels, 29.6.2012
C(2012) 4361 final

COMMISSION DELEGATED DECISION

of 29.6.2012

on investigations and fines related to the manipulation of statistics as referred to in Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

As one of the six legal acts in the economic governance package, Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area ¹ (hereinafter the Basic Act) provides the possibility for the Commission to adopt delegated acts with respect to certain procedures in connection with sanctions concerning the manipulation of statistics.

The economic governance package, taken as a whole, has been designed to address the gaps and weaknesses in the current EU economic governance system that were partly responsible for the economic crisis now confronting the EU. The powers delegated to the Commission must therefore be interpreted in the light of this move towards more robust surveillance of economic and monetary cooperation, including sanction mechanisms.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with recital 17 to the Basic Act appropriate consultations were carried out during the preparatory work, including at expert level.

The parties consulted included national experts invited to two experts' meetings to discuss the draft delegated act. The consultations took place at a first meeting held on 10 January 2012 and a second meeting held on 12 March 2012. Afterwards the conclusions were sent to the experts and used as the basis for preparing a new draft delegated act.

Both the European Parliament and the Council have been duly informed.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

In accordance with Article 8(4) of the Basic Act the objective of the Delegated Act is to supplement the said regulation concerning:

- '(a) detailed criteria establishing the amount of the fine referred to in paragraph 1;*
- '(b) detailed rules concerning the procedures for the investigations referred to in paragraph 3, the associated measures and the reporting on the investigations;*
- '(c) detailed rules of procedure aimed at guaranteeing the rights of the defence, access to the file, legal representation, confidentiality and provisions as to timing and the collection of the fines referred to in paragraph 1.'*

¹ OJ L 306, 23.11.2011, p. 1 .

In order to reflect the chronological order of the procedure envisaged for sanctions concerning the manipulation of statistics, Chapter II of the Delegated Act (following a brief Chapter I on the subject matter and scope) will first address the issues concerning the investigations (subsection b). Since the rules of procedure aimed at guaranteeing the rights of defence and related matters (subsection c) are directly relevant for and refer back to the investigation procedure these are dealt with in Chapter III. Chapter IV specifies the criteria for setting and collecting the fine (subsection a). Chapter V concludes with a provision for governing entry into force.

As a point of clarification, it should be mentioned that for the purposes of the present Decision ‘deficit’, as mentioned in Chapter V of Regulation (EU) No 1173/2011, is considered to be (EDP B.9), as defined in Article 1(3) of Council Regulation (EC) No 479/2009.

Procedures for investigations (Chapter II)

Within Chapter II, Article 2 concerns various obligations and rights of the Commission when initiating investigations. The obligations include notification of the Member State concerned of the decision to initiate an investigation, informing the said Member State of the serious indications justifying the investigation and informing the European Parliament and the Council of the initiation of an investigation. The Commission’s rights include employing the investigative measures in Articles 3 to 5 either individually or in combination, and conducting a methodological visit before launching an investigation, should the Commission (Eurostat) wish to do so. The Court of auditors or other supreme audit institutions of the Member State concerned may also be invited to participate in the investigations where relevant and in accordance with national rules. The subsequent Articles outline the various means of investigations at the Commission’s disposal — namely the request for information (Article 3), the taking of statements (Article 4) and inspections (Article 5). As the investigations in themselves involve obligations and restrictions on the Commission, those are dealt with in Articles 6 to 8.

The Commission’s right to employ the investigative measures either individually or in combination means, for instance, that a prior request for information is not a precondition for conducting a later on-site inspection. As for the Member States they are obliged to provide the information requested. This obligation is justified in that the Commission still has the option of conducting on-site inspections, a coercive form of access to information. Accordingly, the obligation to provide information remains a less invasive and burdensome provision for Member States.

The option of conducting interviews, provided for in Article 4 of the Decision, is another tool available to the Commission for collecting evidence in support of the putative misrepresentation. This option makes sense in that acts by the entities concerned will necessarily be acts by natural persons working for these entities. Consequently, statements from employees, or from other persons in possession of relevant information, can be extremely important in the investigation of the acts of the entities concerned. Such interviews require the consent of the person concerned.

The right of the Member State concerned to be heard or have its comments taken into account is stressed more than once in Article 8 of the Basic Act. Therefore, this right is specified in Article 6 of the Decision.

Article 7 concerns the reporting of the Commission's findings. On adoption the report will be submitted directly to the Member State concerned as well as to the European Parliament and to the Council and published. The Commission (Eurostat) shall also ensure that the European Statistical System Committee and the European Statistical Governance Advisory Board are appropriately informed.

Finally Article 8 sets out limitations on the maximum duration of the investigations as a whole and on inspections more specifically.

Right of defence and confidentiality (Chapter III)

The right of defence and the more specific embodiments of this notion are regulated in Articles 9 to 11. As the investigations envisaged will most probably give the investigators access to confidential or sensitive information it is pertinent to guarantee the confidentiality of such information and this is ensured in Article 12.

As for the documents or information obtained, either by the Member State concerned by means of access to the file or by the Commission, they shall be used solely for the application of this Decision.

Criteria for establishing the amount of the fine (Chapter IV)

In Article 14, some of the principles and circumstances governing the quantification of the fine reflect similar principles and circumstances used in other areas of EU law, not least competition law, while others are adapted to the specific situation of a misrepresentation of deficit and debt data. Generally speaking, the Commission shall ensure that the fine is effective, proportionate and dissuasive.

Among the specific criteria, it should be noted that the concerted action of two or more entities concerned is seen as an aggravating circumstance. This is partly justified by the fact that a concerted action will typically be an indicator of the misrepresentation being intentional. On the other hand the diligence and cooperation of the Member State concerned is considered a mitigating circumstance.

COMMISSION DELEGATED DECISION

of 29.6.2012

on investigations and fines related to the manipulation of statistics as referred to in Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area ², and in particular Article 8(4) thereof,

Whereas:

- (1) Regulation (EU) No 1173/2011 sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the Stability and Growth Pact in the euro area. It applies to Member States whose currency is the euro.
- (2) The availability of sound fiscal data is essential for budgetary surveillance in the euro area. In order to guarantee sound and independent statistics, Member States should ensure the principle of professional independence of national statistical authorities in conformity with Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics³, and as further set out in the European Statistics Code of Practice.
- (3) Regulation (EU) No 1173/2011 empowers the Commission to survey the economic and monetary cooperation with a view to detecting and exposing manipulation of general government deficit and debt data relevant for the application of the multilateral surveillance system and the excessive deficit procedure.
- (4) For that purpose, the Commission should conduct all necessary investigations to confirm the existence of misrepresentations of actual deficit and debt data, as a result of intent or serious negligence, as referred to in Article 8(1) of Regulation (EU) No 1173/2011.
- (5) It is necessary to establish the detailed rules concerning the procedures for investigations, detailed criteria establishing the amount of the fine, detailed rules guaranteeing the rights of the defence, access to the file, legal representation, confidentiality, and provisions as to the timing and collection of fines.

² OJ L 306, 23.11.2011, p. 1.

³ OJ L 87, 31.3.2009, p. 164.

- (6) A decision by the Commission to launch investigations should be justified, and the investigations undertaken should be proportionate so as not to go beyond what is necessary to establish the possible existence of manipulation of the relevant deficit and debt data.
- (7) When undertaking such investigations, the Commission should be able to conduct on-site inspections and request information from any entity to be classified in the general-government sector, whether at central, state, local or social-security level, in accordance with Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community, hereinafter referred to as 'ESA 95'⁴.
- (8) In order to confirm a suspicion following serious indications of misrepresentation of the relevant deficit and debt data, the launch of an investigation should normally be preceded by a methodological visit conducted by the Commission (Eurostat) in accordance with Article 11b of Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community⁵.
- (9) In assessing what constitutes a misrepresentation of deficit and debt data within the meaning of Regulation (EU) No 1173/2011, incorrect implementation of ESA 95 accounting rules which is not the result of either intent or serious negligence should not be considered as such. Further excluded from the application of this Decision should be revisions, including major revisions due to changes in methodology for all historical years, that are clearly and adequately explained, insignificant mistakes and cases where a doubt has been expressed by the Member State concerned and clarification has been requested from the Commission (Eurostat) in accordance with Article 10 of Regulation (EC) No 479/2009.
- (10) Users of European statistics have a legitimate expectation that they are produced by statistical authorities that conduct their activities professionally and with due diligence. An unintentional act or omission should be considered a case of serious negligence if a person responsible for the production of general government deficit and debt data is in patent breach of his duty of care.
- (11) For the purpose of its defence, the Member State concerned should be duly notified of the opening of as well as of the results of the Commission investigations. The results of the investigations should be communicated by means of a Commission report to be transmitted to the European Parliament and to the Council, and to be made public. The Commission (Eurostat) should keep the European Statistical System Committee and the European Statistical Governance Advisory Board appropriately informed.
- (12) The rights of defence and the principle of confidentiality should be respected in accordance with the general principles of law and the case-law of the Court of Justice of the European Union. In particular, the Member State concerned should have the right to be heard by the Commission during the investigations, as well as to access the file compiled by the Commission.

⁴ OJ L 310, 30.11.1996, p. 1.

⁵ OJ L 145, 10.6.2009, p. 1.

- (13) Recommendations to the Council to impose a fine should be based exclusively on grounds on which the Member State concerned has been able to comment.
- (14) Criteria determining the amount of the fine should be established. These criteria should be used to ensure that the fine proposed is fixed at an appropriate level, making it effective, proportionate and dissuasive, based on a reference amount adapted upwards or downwards where necessary in the light of specific circumstances.
- (15) This Decision should be without prejudice to the Commission (Eurostat) exercising its powers under Regulation (EC) No 479/2009.
- (16) The content and form of the measures laid down in this Decision do not exceed what is necessary to achieve the objectives established in Regulation (EU) No 1173/2011, in accordance with Article 5 of the Treaty on European Union.
- (17) This Decision should apply without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁶,

HAS ADOPTED THIS DECISION:

CHAPTER I

SUBJECT MATTER AND SCOPE

Article 1

Subject matter and scope

1. This Decision lays down detailed rules concerning the procedures for investigating misrepresentations of general-government deficit and debt data that are the result of intent or serious negligence, detailed rules concerning the right of defence and confidentiality, detailed criteria establishing the amount of the fine and provisions as to the timing and collection of the fines referred to in Article 8(1) of Regulation (EU) No 1173/2011.
2. This Decision shall apply to Member States whose currency is the euro.

CHAPTER II

PROCEDURES FOR INVESTIGATIONS

Article 2

Initiation of the investigations

1. The Commission shall notify the Member State concerned of its decision to initiate an investigation, including information of the serious indications found of the existence of facts

⁶ OJ L 145, 31.5.2001, p. 43.

liable to constitute a misrepresentation of general government deficit and debt data arising from the manipulation of such data as a result of either intent or serious negligence.

2. During an investigation, the Commission (Eurostat) may request information, interview persons, conduct on-site inspections and accede to the accounts of all government entities at central, state, local and social security level, in accordance with the procedures laid down in Articles 3 to 5. Those means of investigation may be employed by the Commission (Eurostat), either individually or in combination. Where relevant and while fully respecting national rules governing such institutions, the court of auditors or other supreme audit institutions of the Member State concerned may be invited to assist and participate.

3. The Commission may opt not to conduct such an investigation until a methodological visit has been carried out in accordance with a decision taken by the Commission (Eurostat) under Regulation (EC) No 479/2009.

4. The Commission shall inform the European Parliament and the Council of its decision to initiate an investigation.

Article 3

Request for information

1. At the request of the Commission, any government entity, directly or indirectly involved in compiling debt and deficit data of the Member State concerned, or whose accounts are used for this compilation (hereinafter referred to as ‘the entity concerned’) shall provide the Commission with all necessary information to perform its task of investigation. The Member State concerned shall be informed about any such request by the Commission to the entity concerned.

2. The Commission shall state the purpose of the request, specifying that the request is made pursuant to this Decision, and shall indicate a deadline for the reply, which shall be no less than four weeks.

Article 4

Interviews

The Commission may interview any person directly or indirectly involved in compiling deficit and debt data, who agrees to be interviewed, for the purpose of collecting information or explanations concerning facts or documents relating to the subject-matter of an investigation and to record the answers. The entity concerned shall be informed before any of its representatives or members of staff are interviewed. The person interviewed may request the assistance of a representative of the entity concerned or of a legal counsel.

Article 5

Inspections

1. The Commission officials and other accompanying persons authorised by the Commission to conduct an inspection shall be empowered to:

(a) enter any premises of the entity concerned;

(b) accede all records and accounts of the entity concerned, irrespective of the medium on which they are stored;

(c) take or obtain any form of copy or extract of any records and accounts;

(d) seal any records and accounts to the extent and for the period of time necessary to compile the factual evidence for the investigation while not hampering the essential activities of the entity concerned.

(e) ask any representative or member of staff of the entity concerned for explanations on facts or documents relating to the subject-matter and purpose of the inspection, under the conditions laid down in Article 4 .

2. The Commission officials and other accompanying persons authorised by the Commission to conduct an inspection shall present a written authorisation specifying the subject matter and purpose of the inspection, stating the date on which the inspection begins.

3. The entity concerned shall fully cooperate with the Commission for the purposes of the inspection.

4. Staff members of statistical authorities of the Member State concerned shall, at the request of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 1.

5. Where the Commission officials and other accompanying persons authorised by the Commission find that an entity opposes an inspection ordered pursuant to this Article, the Member State concerned shall provide them the necessary assistance according to national rules.

6. If, by national rules, the authorisation from a judicial authority is necessary for the conduct of the inspection, such authorisation shall be applied for by the Commission. In those cases the authorisation from a judicial authority shall be presented along with the written authorisation referred to in paragraph 2.

Article 6

Right to be heard

Before adoption of the report referred to in Article 7, the Commission shall invite the Member State concerned to submit written observations on the preliminary findings.

It shall do so in writing, indicating a deadline for the submission of those observations, which shall be no less than four weeks.

Article 7

Reporting

1. The Commission shall adopt a report presenting its findings and the observations submitted by the Member State concerned in the light of the investigations conducted in accordance with this Chapter and submit it to that Member State.

2. The Commission shall transmit this report to the European Parliament and the Council. This report shall be made public.

3. The Commission (Eurostat) shall inform the European Statistical System Committee and the European Statistical Governance Advisory Board about the outcome of the investigation.

4. Any Commission recommendation to the Council to impose a fine on the Member State concerned shall be based on the report referred to in paragraph 1.

Article 8

Duration

1. The Commission shall adopt the report referred to in Article 7 no later than ten months after notification of its decision to initiate an investigation according to Article 2. In exceptional cases, where the investigations are obstructed or where the acquisition of the information necessary for the investigations involves excessively long procedures, the Commission may extend the deadline by five months.

2. The inspections shall be completed within six months of the starting date of the inspection. In exceptional cases, where the inspections are obstructed or where the acquisition of the information in connection with the inspections involves excessively long procedures, the Commission may extend the deadline by three months.

CHAPTER III

RIGHT OF DEFENCE AND CONFIDENTIALITY

Article 9

Right of defence

The principle of the right of defence shall apply to any implementation of this Decision.

Article 10

Access to the file

The Member State concerned shall have the right, on request, to access all documents and other factual materials compiled by the Commission which could serve as supporting evidence for the recommendation to the Council to impose the said Member State a fine.

Documents obtained by the Member State concerned through access to the file shall be used solely for the purposes of this Decision.

Article 11

Legal representation

The Member State concerned, any entity concerned, any person working for such an entity or any other natural person concerned shall have the right to legal representation during the investigations.

Article 12

Confidentiality and professional secrecy

The investigations set out in Chapter II shall be conducted subject to the principles of confidentiality and professional secrecy. The Commission officials and other accompanying persons authorised by the Commission shall not disclose information that is acquired in the framework of the investigation which is covered by the obligation of professional secrecy and confidentiality.

Documents or information obtained by the Commission in the course of the investigations shall be used solely for the purposes of this Decision.

CHAPTER IV

CRITERIA FOR ESTABLISHING THE AMOUNT OF THE FINE

Article 13

Maximum amount

The total amount of the fine shall not exceed 0.2% of the latest official gross domestic product at current market prices of the Member State concerned, as defined in ESA 95, in the preceding year.

Article 14

Criteria with regard to the amount of the fine

1. The Commission shall ensure that the fine to be recommended is effective, proportionate and dissuasive. The fine shall be established on the basis of a reference amount that may be modulated upwards or downwards when taking into account the specific circumstances referred to in paragraph 3.
2. The reference amount shall be equal to 5% of the larger impact of the misrepresentation on the level of either the general government deficit or debt of the Member State for the relevant years covered by the notification in the context of the excessive deficit procedure.
3. Taking into account the maximum amount established in Article 13, the Commission shall in each case take into consideration, where relevant, the following circumstances:
 - (a) the seriousness and the wider effects of the misrepresentation; in particular, the impact of the misrepresentation on the functioning of the strengthened economic governance of the Union;
 - (b) the fact that the misrepresentation has been shown to be the result of serious negligence or, alternatively, the misrepresentation has been shown to be intentional;
 - (c) the fact that the misrepresentation was the work of one entity acting alone or, alternatively, the misrepresentation was the result of a concerted action by two or more entities;

(d) the repetition, frequency or duration of the misrepresentation by the Member State concerned; in such cases, the reference amount shall be the highest magnitude detected and shall be multiplied by the number of years, across the four years of the last notification, in which the relevant misrepresentation occurred;

(e) the degree of diligence and cooperation, alternatively the degree of obstruction, shown by the Member State concerned in the detection of the misrepresentation and in the course of the investigations.

Article 15

Limitation period for the collection of fines

1. The right of the Commission to enforce decisions taken by the Council pursuant to Article 8(1) of Regulation (EU) No 1173/2011 shall be exercised within a period of five years.

2. The period shall begin to run on the day on which the Member State concerned is notified of the decision of the Council.

3. The limitation period for the recovery of fines shall be interrupted by any action of the Commission designed to enforce payment of the fine or shall be suspended for so long as enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Union.

CHAPTER V

FINAL PROVISION

Article 16

Entry into force

This Decision shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 29.6.2012

For the Commission

The President

José Manuel BARROSO